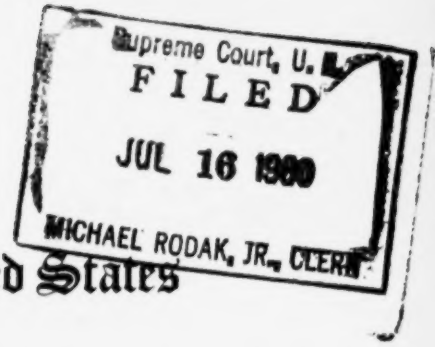

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-6779

WALTER LITTLE

Appellant

v.

GLORIA STREATER

Appellee

ON APPEAL FROM THE APPELLATE SESSION OF THE SUPERIOR COURT OF CONNECTICUT

MOTION TO DISMISS OR AFFIRM

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July 15, 1980

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ON APPEAL FROM THE APPELLATE SESSION OF THE SUPERIOR COURT OF CONNECTICUT

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Appellate Session of the Superior Court of Connecticut on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

OPINION BELOW

The opinion of the Supreme Court of Connecticut and the Appellate Session of the Superior Court of Connecticut are as set forth in Appellant's Jurisdictional Statement at Page 1.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Appellant's Jurisdictional Statement on Page 2.

I

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

This appeal raises the question of the validity of Connecticut General Statute Section 46b-168 (1979). That statute states:

> "In any proceeding in which a question of paternity is in issue, the Court, on motion of any party, may order the mother, her child and the putative father or the husband of the mother to submit to one or more blood grouping tests to be made by a qualified physician or other qualified person, designated by the court, to determine whether or not the putative father or the husband of the mother can be excluded as being the father of the child. The results of such tests will be admissable in evidence only in cases where such results establish definite exclusion of the putative father or such husband as such father. The costs of making such tests shall be chargeable against the party making the motion."

This case also involves the following Constitutional provision of Section One of the Fourteenth Amendment to the Constitution of the United States which states:

> "[N]or shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTION PRESENTED

1. Whether the costs of a blood grouping test ordered on the motion of an indigent defendant in a paternity action must be paid by the State of Connecticut lacking any statutory authority for such payment.

STATEMENT

The Appellant in this action was named by the Appellee, Gloria Streater, to be the father of her minor child in a paternity action instituted on July 11, 1977.

The Appellant later moved that the Appellee, her minor child and himself be ordered to submit to blood grouping tests with the request that the costs of such tests be paid by the Appellee, State of Connecticut.

The Appellant's motion for blood grouping tests was granted by the trial court. However, his request that the costs of such tests be borne by the State of Connecticut was denied.

On October 4, 1978, after hearing the Appellant was found to be the father of the minor child of the Appellee, Gloria Streater.

The Appellant appealed the denial of his request that the State of Connecticut pay for blood grouping tests to the Appellate Session of the Superior Court of Connecticut.

The Appellate Session affirmed the order of the trial court.

The Appellant filed a petition for certification to the Supreme Court of the State of Connecticut.

The Supreme Court of the State of Connecticut denied Appellant's petition for certification.

ARGUMENT

The decision of the Appellate Session of the Superior Court of Connecticut is clearly correct.

Section 52-184 of the Connecticut General Statutes makes it very clear who the legislature of the State of Connecticut intended to bear the cost of blood grouping tests in paternity actions. The final sentence of Section 52-184 states:

> "The costs of making such tests shall be chargeable against the party making the motion."

There is no authority under Connecticut law for a court to order the State to assume the costs of blood grouping tests for defendants in paternity actions. This principle was clearly established in the case of *Ferro v. Morgan*, A.S. 686, 35 Conn. Supp. 679 (1979). This decision in the *Ferro* case reversed the order of a trial judge who had ordered the State of Connecticut to pay the costs of blood grouping tests in a situation identical to the present case. The general rule in Connecticut is that every litigant must bear his own expenses of litigation except as otherwise provided by statute. *City of Hartford v. Public Utilities Commission*, 30 Conn. Supp. 244, 309, A.2d. 844 at 848 (1973).

The fact that some other states bear the costs of blood grouping tests is not a basis upon which to require the State of Connecticut to do likewise. Because a number of states bear the costs of providing a defendant with an evidentiary tool does not elevate the access to such a tool to the status of a fundamental right.

The Supreme Court, in the case of *Robertson v. Apuzzo*, 170, Conn. 367 (1976), laid to rest the contention that a paternity action in Connecticut is a quasi-criminal proceeding and held that such an action is clearly a civil one. Therefore, the Court held that an indigent defendant in a paternity action is not denied constitutional due process when he is denied a jury trial because of his inability to pay the statutory fee, 170 Conn. 367, 380.

In reaching its conclusion in *Robertson v. Apuzzo*, the Court approached the problem "with a clear understanding that the requirements of due process are not fixed but depend on the nature of the case under consideration and the relative interests, both governmental and private, involved." 170 Conn. 367, 372.

The due process and equal protection clause of the United States Constitution operate to require that greater protection be afforded defendants in criminal and quasi-criminal proceedings than in civil actions. *Franklin v. Colorado*, 4 Family Law Reporter 2037; *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L.Ed. 891 (1956). In *Robertson v. Apuzzo*, the Court held that a paternity action in Connecticut is a civil one. Therefore, the requirement that the moving party on a motion for blood grouping tests be required to bear their costs must be analyzed in light of the due process requirements applicable to civil actions.

The Supreme Court in *Boddie v. Connecticut*, 401 U.S. 371, 28 L.Ed. 2d 113, 91 S. Ct. 780 (1971), set forth the requirements of due process which have taken shape over the space of more than one hundred years of judicial interpretation. The

Court stated:

> What the Constitution does require is "an opportunity . . . granted at a meaningful time and in a meaningful manner," Armstrong v. Manzo, 380 U.S. 545, 552; 14 L.Ed. 2d. 62, 85 S. Ct. 1187 (1965) (emphasis added), "for [a] hearing appropriate to the nature of the case." Mullane v. Central Hanover Trust Co., supra, at 313, 94 L.Ed. at 873. The formality and procedural requisition for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceeding. 28 L.Ed. 2d at 118.

The defendant argues that the deprivation of the opportunity to present evidence of blood grouping tests because of his lack of funds to procure them would deprive him of the meaningful opportunity to be heard mandated by *Boddie*. However, the Court in *Boddie* refused to mandate any particular form of hearing, stating, as cited above, that the "formality and procedural requisites can vary, depending upon the importance of the interests involved and the nature of the subsequent proceeding." *Boddie v. Connecticut*, supra 28 L.Ed. at 118.

The State does not dispute that a defendant has a strong interest in providing the best valid defense he can in any civil action. However, the defendant-appellant here would have us believe that without the availability of blood grouping tests he is thereby deprived of the opportunity to defend the paternity action.

The Court in *Boddie* pointed out that a "State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the premise of the Due Process Clause" but "within the limits of practicability." *Boddie v. Connecticut*, supra, 28 L.Ed. 2d at 119-120. If the Court had granted the defendant's Motion for a Blood Test In Forma Pauperis, the State would be subsidizing the defendant's defense.

In *Ferro*, supra, the Appellate Session of the Superior Court of Connecticut met the denial of due process argument in the following fashion:

> "The requirements of due process are not fixed but depend upon the nature of the case under consideration and the relative interests, both governmental and private which are involved." *Robertson v. Apuzzo*, 170 Conn. 361, 372. It is important to point out that in Connecticut paternity actions are civil and not criminal proceedings and the general rules governing civil actions apply. Ibid. The defendant is in Court; he can invoke the rules of pretrial discovery, and he can present evidence material to his defense. The defendant in a paternity action has a meaningful opportunity to be heard at a meaningful time, and due process is not violated."

In *Robertson v. Apuzzo*, 170 Conn. 367, 365 A.2d 824 (1976), the Connecticut Supreme Court analyzed the equal protection argument in relationship to the payment of a fee to obtain a Jury Trial in a paternity action. In holding that such a fee does not deny a defendant constitutional equal protection of the laws the Court stated:

> The problem is primarily one of economic equality rather than one of political equality or equality of opportunity. See Wilkinson, "The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality," 61 Va. L. Rev. 945. A free Jury Trial in the context of paternity proceedings to maintain a child bears little resemblance "to free speech or marriage or to those other rights, so many of which are inbedded in the First Amendment, that the Court has come to regard as fundamental . . . ." *United States v. Kras*, supra, 446; see *Dunn v.*

Blumstein, 405 U.S. 330, 92 S. Ct. 995, 31 L.Ed. 2d 294 (the right to vote); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 94 S. Ct. 1076, 39 L.Ed. 2d 306 (right of an indigent to medical care); *Shapiro v. Thompson*, 394 U.S. 618, 89 S. Ct. 1322, 22 L.Ed. 2d. 600 (right to interstate travel); *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814; 9 L.Ed. 2d 811 (the right to vote); *Kusper v. Pontikes*, 414 U.S. 51, 94 S. Ct. 303, 38 L. Ed. 2d 260 (freedom of association). Nor does it involve a statutory classification based on race (*Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d. 1010); alienage or national origin (*Graham v. Richardson*, 403 U.S. 365, 91 S. Ct. 1848, 29 L.Ed. 2d 534). Paternity legislation, designed to provide for the support and maintenance of the child, is in the area of economics and social welfare. See *Kuser v. Orkis*, 169 Conn. 66, 71, 362 A. 2d 943; see *Ortwein v. Schwab*, 410 U.S. 656, 93 S. Ct. 1172, 35 L. Ed. 2d 572, rehearing denied, 411 U.S. 922, 93 S. Ct. 1551, 36 L. Ed. 2d 315; *United States v. Kras*, supra; *Danbridge v. Williams*, 397 U.S. 471, 484-85, 90 S. Ct. 1153, 25 L. Ed. 2d 491. Hence, "the applicable standard, in measuring the propriety of . . . [the legislature's] classification, is that of rational justification." *United States v. Kras*, supra. It is readily apparent that the purpose of the fee is to offset some of the costs of a Jury Trial and the fee is required of every civil litigant who asks for such a trial. We conclude that the jury fee serves a legitimate State interest in a paternity action and satisfies the equal protection clause of the fourteenth amendment to the federal constitution and article first Section 20, of the Constitution of Connecticut. 170 Conn. at 382, 383.

The Court's analysis in *Robertson v. Apuzzo* is applicable as well to this case. A paternity action is in the realm of

economic and social welfare and therefore the rational basis test must be applied to the legislative classification. The burden therefore rests on the defendant "to show that the legislation in question does not have a rational basis." *Horton v. Meskill*, 172 Conn. 615, 640, 376 A.2d. 359 (1977).

In deciding *Ferro*, supra, this Court viewed the equal protection issue in this manner at 11:

> "The legislature, in the exercise of its powers, enacted General Statutes Section 52-184. It has general application. It provides in part that "[t]he costs of making such [blood grouping] tests shall be chargeable against the party making the motion." The purpose was to provide that any party where a question of paternity is an issue, who wants such tests may obtain a court order to that effect, but that party, and no one else, was to bear its expense. This statutory placing of such an expense on the party who moves for the tests provides that the cost of litigation be on the one who desires that evidence. There is no denial of equal protection under either the United States or Connecticut Constitutions."

Therefore, under the holdings of *Robertson v. Apuzzo*, supra, *Ferro*, supra, and the present case, the requirement that the moving party bear the costs of blood grouping tests satisfies the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution and article first, Section 20, of the Constitution of Connecticut.

CONCLUSION

For reasons above stated, the respondent requests that the judgment of the Appellate Session of the Superior Court of Connecticut be affirmed or in the alternative that the petitioner's appeal be dismissed.

Respectfully submitted,

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CERTIFICATION OF SERVICE

This is to certify that on the 15th day of July, 1980, a copy of the foregoing Motion to Dismiss Or Affirm was deposited in a United States Post Office or mailbox with first class postage prepaid, addressed to counsel of record to wit:

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